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No. 82-497

In The

Supreme Court of the United States

October Term, 1982

ALBERTA GAS CHEMICALS, LTD.,
Petitioner,

v.

CELANESE CORPORATION and CELANESE CHEMICAL COMPANY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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November 10, 1982

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PETITIONER'S REPLY BRIEF

This brief is in reply to the brief filed by respondents ("Celanese") in opposition to the petition for a writ of certiorari filed by petitioner ("Alberta Gas").

A. Conflict Among the Circuits.

Celanese contends that there is no conflict between the decision of the Second Circuit in this action and the decisions of the Ninth, Fifth and District of Columbia Circuits in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674

F.2d 1252 (9th Cir. 1982), *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972). (Celanese brief at pages 10-11). Celanese seizes upon the circumstance that those cases were brought under state and federal antitrust laws while the present case involves unfair competition.

Even the most cursory reading of *Clipper Exxpress*, *Woods Exploration* and *Israel* leads to the conclusion that the nature of the cause of action was irrelevant to the decision. In each of those cases, the court held that a cause of action exists when intentional misstatements made by a competitor to an administrative agency have damaged the plaintiff.[1] The concern of each court was to protect the integrity of the administrative process. Each court recognized the inability of administrative agencies to verify all the facts presented by the parties; and each court recognized the deterrent effect of a private cause of action for intentional misstatements. For example, the Ninth Circuit was not confining itself to any particular cause of action when in *Clipper Exxpress* it recognized that a private action can be based on a fraudulent misrepresentation to an administrative body:

> "*Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts*, however, *rely on the information presented by the parties* before them. They seldom, if ever, have the time or resources to conduct independent investigations. *The recognition, however, of a private right of action based on the fraudulent*

[1] Although it is true that in each of those cases all the elements of an antitrust violation were stated, it is clear that the sole tortious act was the misrepresentation made by the defendant to an administrative agency. ("[A] cause of action is established so long as the elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information." *Clipper Exxpress*, 674 F.2d at 1272.) Similarly, all the elements of a claim of unfair competition have been set forth in the complaint in this case and the violation was executed by Celanese's fraudulently supplying information to the International Trade Commission.

misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." Clipper Exxpress, 674 F.2d at 1272 (Emphasis added).

Alberta Gas alleges in its complaint that Celanese's intentional misstatements to the International Trade Commission were part of a plan designed, *inter alia,* to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta, Canada. (App. G-2). Celanese's plan to suppress Alberta Gas's ability to engage in sales activities echoes the defendants' plan in *Israel* to block the approval for sale of the plaintiffs' drug, the defendants' plan in *Woods* to issue false production forecasts which would reduce the plaintiffs' quota of permissible production and the defendants' plan in *Clipper Exxpress* to delay the approval of tariffs upon which the plaintiff's opportunity to offer its services depended. All these plans were implemented by lying to an administrative agency. The Fifth, Ninth and District of Columbia Circuits recognized that such conduct compromises paramount public interests. Even the Second Circuit declared on Alberta Gas's first appeal to that court that there is a "clear public interest in a correct determination of whether imports of methanol should be restricted, since the restrictions will almost certainly affect the price American consumers pay for this product." (App. B-8). By subsequently discerning impediments to a cause of action for lying to an administrative agency, the Second Circuit brought itself into irreconcilable conflict with the other Courts of Appeals.

Celanese wants this Court to view *Clipper Exxpress, Woods Exploration* and *Israel* as merely part of the *Noerr-Pennington* line of cases. However, the only reason *Noerr-Pennington* was discussed in those cases was because the defendants sought to hide behind that doctrine. The reasons for allowing suits based on fraudulent misstatements made to administrative agencies far outweigh any basis for immunity referred to in *Noerr-Pennington.* (*See also* Alberta Gas Petition at page 9, footnote 7).

B. Celanese's Other Arguments.

All of Celanese's remaining arguments avoid the issue presently before this Court, *i.e.*, whether to resolve the conflict among the circuits created by the Second Circuit's decision in the instant action. Instead, Celanese argues the substantive issue of whether courts should recognize a cause of action for perjury committed before an administrative agency. In other words, it argues that *Clipper Exxpress, Woods Exploration* and *Israel* were all incorrectly decided.

Not only are those arguments irrelevant to the issue presently before this Court, they are incorrect:

1. Celanese asserts the "ancient rule" that "no action lies to recover damages caused by perjury." (Celanese brief at pages 7-8). It cites *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975). In actuality, *Newin* holds that there is an exception to that rule where the issue raised in the second action is broader than, or different from, the claim in the first action. Celanese reluctantly recognizes that holding but then argues that the exception requires conduct other than the perjury itself. (Celanese brief at pages 9-10). Again, under the facts in *Newin* this is clearly not true:

> "[T]he *sole* moving factor in the alleged fraud and deceit . . . [was] the allegedly false testimony. . . ." *Id.* at 220, 333 N.E.2d at 168, 371 N.Y.S.2d at 892. (dissent; emphasis in original).[2]

The pillar of the "ancient rule" against suits based on perjury is the doctrine of *res judicata*. *See Smith v. Lewis*, 3 Johns. 157 (N.Y. 1808), which was cited in *Newin*. The rule derives from the concept that misrepresentations of fact in a litigation are deemed to be implicitly litigated and are not subject to relitigation because of the doctrine of *res judicata*. Clearly, therefore, the rule is totally inapplicable to mis-

[2] Obviously, if there were fraudulent conduct in addition to the perjury there would be no need to invoke the exception. Instead, there would be a simple allegation of basic fraud.

statements made to administrative agencies where, as in the instant action, there are no "parties" to the proceeding, no discovery, no effective cross-examination and no meaningful opportunity to "litigate" the perjury issue.[3] The cases cited by Celanese in support of the general rule against suits for perjury (Celanese brief at page 8, footnote 7), are inapposite to the facts in the instant action because in each instance the plaintiff had at least one opportunity to obtain relief for the injury which it suffered. That fact contrasts sharply with the instant action in which Alberta Gas has no remedy to seek compensation for the damages which it suffered at the hands of Celanese, unless such remedy is available in the present case. The Court of International Trade is powerless to provide damages. *See* Celanese brief, Appendix 1.

2. Celanese asserts that this action is an attempt by Alberta Gas to obtain damages for the antidumping duties imposed on it. (Celanese brief at pages 12-13). In fact, no antidumping duties were ever paid by Alberta Gas and no claim for damages relating to those duties is being sought by Alberta Gas. Rather, Alberta Gas is seeking, among other things, damages for the sales and profits which it lost because of Celanese's misrepresentations. None of the customs tribunals have ever had the power to award damages.

3. Celanese argues that *Nichols v. Alker*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956), is "[d]irectly in point" in support of its contention that the district court did not have subject matter jurisdiction. (Celanese brief at pages 14-15). Yet *Nichols* was completely different from the instant action. The issue in that case was whether the plaintiffs could bring their action despite the facts that (i) they had been lawfully enjoined from doing so under a decree issued by a federal

[3] This Court has expressly recognized "that *res judicata* principles do not apply to administrative proceedings" unless the "administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 421-22 (1966).

district court and (ii) they had previously brought virtually the same action in the same court and the prior action had been dismissed on the merits. Obviously, *Nichols* bears no resemblance to the instant action, in which Alberta Gas has not otherwise had an opportunity to seek a private remedy.

4. Celanese appears to repeat its contention first made in the Court of Appeals that Celanese's testimony to the International Trade Commission was helpful to Alberta Gas and not harmful. (Celanese brief at page 4, footnote 3). This contention rests on a misreading of the opinion of the Court of International Trade.[4]

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[4] The Court of International Trade did not state that the commission majority made a finding "that there would be no future expansion" of methanol consumption in the United States. Rather, the court criticized the commission for concluding that if Alberta Gas's new plant became operational in the future, the amount of methanol available from Canada would represent 10% of U.S. consumption—because the commission was comparing *future* imports from Canada with *current* U.S. consumption to arrive at that critical percentage. The court stated: "Thus, the commission majority not only assumed the future increased capacity available for export to the United States, but also implicitly postulated, contrary to the evidence in the record, that there would be no future expansion in the United States consumption of methyl alcohol." *Alberta Gas Chemicals, Inc. v. United States,* 515 F. Supp. 780, 791 (U.S.C.I.T. 1981). In other words, the court was criticizing the commission for comparing future imports with current consumption.

Celanese also misperceives the holding of the Court of International Trade when it asserts that the court reversed the commission, in part, because the commission had incorrectly found "that there was a likelihood of 'expanding supplies of methyl alcohol from Canada' " and that information about Celanese's planned expansion in Canada (which Celanese now admits) would have supported the commission's finding. The court's concern was not with the amount of methanol to be produced in Canada by new plants. Rather, the court was concerned with the fact that the construction of plants to produce methanol took many years to complete and that such plants could not be considered "real and imminent" dangers to the United States methanol market. *Id.* at 791. Since the development of the Celanese plant was behind that of the Alberta Gas plant, truthful testimony would not have changed the view of the court that the construction of the Alberta Gas plant was not presenting a "real and imminent" danger.

CONCLUSION

For the foregoing reasons and the reasons set forth in its petition, Alberta Gas respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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